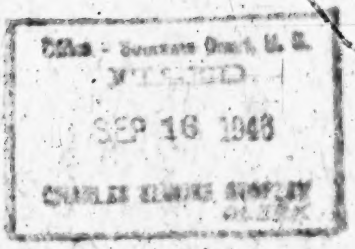
FILE COPY



No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	3
Statement:	
I. The representation proceeding	3
II. The unfair labor practice proceeding	17
Specification of errors to be urged	20
Summary of argument	22
Argument	25
I. The Board, by standards applicable in Board-directed elections, properly refused to entertain the post-election challenge to Mrs. Kane's eligibility	27
A. The election procedures established by the Board afford reasonable assurance that only eligible persons will vote	31
B. The Board's refusal to entertain post-election challenges is a reasonable measure to assure secrecy of the ballot and finality of the election	40
II. The Board properly held that since respondent had signed a consent election agreement, it was bound by the regional director's rulings which were neither arbitrary nor capricious	54
A. Article III, Section 12, of the Board's Rules and Regulations, which provides that, in a consent election, the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, is valid as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious	54
B. The regional director's ruling was neither arbitrary nor capricious	60
Conclusion	73
Appendix	75

712662—46——1

CITATIONS

Cases:

	Page
Aetna Firebrick Co., Matter of, 56 N. L. R.B. 849	26, 57
American Granite Finishing Co., Matter of, 28 N. L. R. B. 739	41, 70
American Steel Scraper Co., Matter of, 21 N. L. R. B. 218	34
Beggs & Cobb, Inc., Matter of, 62 N. L. R. B. 193	41
Bradley v. *Neill*, 174 La. 702, 141 So. 382	49
Cambre v. *Brignac*, 19 La. App. 437, 140 So. 702	49
Capitol Greyhound Lines, Matter of, 49 N. L. R. B. 156, enforced, 140 F. 2d 754, certiorari denied, 322 U. S. 763	26, 42, 50, 51, 57, 58, 59, 63, 70
Chenango County Mutual Ins. Co., In re, 19 Wend. (N. Y.) 635	50
Chrysler Corp., Matter of, 63 N. L. R. B. 866	39, 42, 47
Cudahy Packing Co., Matter of, 26 N. L. R. B. 749, 27 N. L. R. B. 108, 4 N. L. R. B. 39	37, 72
Cushman Shoe Co., Matter of, 2 N. L. R. B. 1015	37
Davis v. *Town of Saluda*, 147 S. C. 498, 145 S. E. 412	49
Denver Publishing Co., Matter of, 61 N. L. R. B. 338	41
Duplessis v. *Harrell*, 9 La. App. 171, 119 So. 264	49
Elliott Bay Lumber Co., Matter of, 9 N. L. R. B. 3	32
Hale, Wayne, Matter of, 62 N. L. R. B. 1393	41
Hand & Johnson Tug Line v. *Canada S. S. Lines, Ltd.*, 281 Fed. 779	63
Hartbridge, The, 62 F. 2d 72, certiorari denied, 288 U. S. 601	59, 65
Hofman, O. U., Matter of, 55 N. L. R. B. 683, enforced, 147 F. 2d 679	57
Holgate Brothers Company, Matter of, 31 N. L. R. B. 485	33
Home Mfg. Co., Matter of, 26 N. L. R. B. 916	34
"Hunt" for Chevrolets, Matter of, Decision No. 3593, Case No. WE-421, July 8, 1946, 18 L. R. R. M. 1229	38
Hyde v. *Brush*, 34 Conn. 454	49
Kellogg Switchboard and Supply Co., Matter of, 28 N. L. R. B. 847	42, 57, 70
Kihlberg v. *United States*, 97 U. S. 398	59, 65
Kilburn Mills, Matter of, 48 N. L. R. B. 1252	72
KMOX Broadcasting Station, Matter of, 10 N. L. R. B. 479	34
Lamar Cotton Oil Co., Matter of, 67 N. L. R. B. No. 188	72
Manaster, Harry, & Bro., Matter of, 61 N. L. R. B. 1373	42
Marine Transit Corp. v. *Dreyfus*, 284 U. S. 263	59
Marlin-Rockwell Corp. v. *National Labor Relations Board*, 116 F. 2d 586, certiorari denied, 313 U. S. 594	28
Martinsburg & Potomac R. Co. v. *March*, 114 U. S. 549	59
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	27
McGrath, Re, 17 Ont. L. 514	49
Memphis Trust Co. v. *Brown-Ketchum Iron Works*, 166 Fed. 398, certiorari denied, 214 U. S. 515	59

Cases—Continued

	Page
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387	59
Metro-Goldwyn-Mayer Studios, Matter of, 8 N. L. R. B. 858	37
Minton v. *F. G. Smith Piano Co.*, 36 App. D. C. 137	59
Mobile Steamship Ass'n, Matter of, 8 N. L. R. B. 1297	34
Monon Stone Company, Matter of, 10 N. L. R. B. 64	34
Moore v. *Bay*, 149 Md. 286, 131 Atl. 459	49
Morrill v. *Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547	50
Moulton Ladder Mfg. Co., Matter of, 27 N. L. R. B. 40	72
National Labor Relations Board v. *Central Dispensary and Emergency Hospital*, 145 F. 2d 852, certiorari denied, 324 U. S. 847	28
National Labor Relations Board v. *National Mineral Co.*, 134 F. 2d 424, certiorari denied, 320 U. S. 753	37
National Labor Relations Board v. *The Standard Lime and Stone Co.*, 149 F. 2d 435, certiorari denied, 326 U. S. 723	28
National Labor Relations Board v. *Whittier Mills Co.*, 111 F. 2d 474	28
National Mineral Co., Matter of, 27 N. L. R. B. 432	37
New York Handkerchief Mfg. Co. v. *National Labor Relations Board*, 114 F. 2d 144, certiorari denied, 311 U. S. 704	28
Norris, Inc., Matter of, 63 N. L. R. B. 502	39, 42, 70
Owens-Corning Fiberglas Corp., Matter of, 61 N. L. R. B. 546	41, 70
Palmer v. *New York Herald Co.*, 228 App. Div. 176, 239 N. Y. S. 619	63
Patent Button Co., Matter of, 65 N. L. R. B. No. 51	72
Pellon v. *Conn. Gen. Life Ins. Co.*, 105 Vt. 508, 168 Atl. 701	63
Pendleton v. *Pace*, 9 S. W. 2d 437	59
People v. *Robinson*, 64 Calif. 373, 1 Pac. 156	50
Perez v. *Cognevich*, 156 La. 331, 100 So. 444	49
Plumley v. *United States*, 226 U. S. 545	59
Port Arthur Provincial Election, Re, 14 Ont. L. 345	49
Post Printing and Publishing Co., The, Matter of, 59 N. L. R. B. 1115	35
Price, John, Sr., Matter of, 67 N. L. R. B. No. 146	42
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793	29
Richardson & Sons v. *Hedger Transportation Corp.*, 98 F. 2d 55	59, 65
Rock River Woolen Mills, Matter of, 18 N. L. R. B. 828	34
Rossing v. *State Bank*, 181 Ia. 1013, 165 N. W. 254	50
Schumacher, Re, 21 Ont. L. 522	49
Solvay Process Co., Matter of, 37 N. L. R. B. 983	72
Southern S. S. Co. v. *National Labor Relations Board*, 316 U. S. 31	38
Standard Oil Co., Matter of, 23 N. L. R. B. 860	34

Cases—Continued	Page
Turregano v. *Whittington*, 132 La. 454, 61 So. 525	49
Twombley v. *Framingham Gas, Fuel & Power Co.*, 248 Mass. 53, 143 N. E. 828	63
United States v. *Cooke*, 207 Fed. 682	59, 65
United States v. *Gleason*, 175 U. S. 588	59
United States v. *Mason & Hanger Co.*, 260 U. S. 323	59
Virginia Bridge Co., Matter of, 29 N. L. R. B. 241	33
Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515	28
Wadham's Division of Socony Vacuum Oil Co., Matter of, 54 N. L. R. B. 1164	35
Walton Lumber Co., Matter of, 20 N. L. R. B. 573	34
Wilkins v. *Allen*, 169 N. Y. 494, 62 N. E. 575	59, 65
Worcester Woolen Mills Corp., Matter of, 69 N. L. R. B. No. 51	39, 42
Federal statutes:	
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):	
Section 6	54, 75
Section 7	75
Section 8	75
Section 9 (a)	27, 28, 52, 75
Section 9 (c)	27, 76
Section 9 (d)	76
Section 10 (e)	77
Railway Labor Act, Section 2, Fourth, c. 347, 44 Stat. 577, c. 691, 48 Stat. 1186, 45 U. S. C. 152, Fourth	27
State statutes:	
Alabama Code 1940, Title 17, Sections 187–190	70
California Civil Code (Deering's), Section 320a	50
California Elections Code (Deering's), Sections 5620–5631	70
Colorado Stat. Ann. 1935, c. 59, Section 228	70
Connecticut Rev. Stat. 1930, Section 602	49, 70
Delaware Rev. Code 1935, Sections 1862, 2023, 2061	49, 50
Florida Stat. Ann., Section 102.42	70
Georgia Code Ann., Section 34–805	70
Idaho Code Ann. 1932, Sections 33–916, 33–924	70
Kentucky Rev. Stat. 1944, Sections 118.240, 118.260	71
Louisiana Gen. Stats. (Dart's), 1939 Ann., Section 2741	71
Maine Rev. Stat. 1944, c. 5, Section 38	71
Maryland Ann. Code 1939, Article 33, Sections 57, 106	71
Michigan Compiled Laws 1929, Sections 3122, 3124	49, 71
Minnesota Statutes (Mason's) 1927, Section 425	71
Mississippi Code Amer. 1942, Section 3129	71
Montana Rev. Code 1935 Ann., Sections 573, 5971.1	50, 71

State statutes—Continued
Page
Nevada Comp. Laws 1929, Section 2449 71
New Hampshire Rev. Laws 1942, c. 41, Section 16 71
New Jersey Rev. Stat. 1937, Sections 14:10-5, 14:10-6, 19:15-18, 19:15-34 ..... 49, 50, 71
New Mexico Stat. 1941 Ann., Section 56-314 71
New York-McKinneys Consol. Laws Ann., Elections, Sections 361-364 71
New York-McKinneys Consol. Laws, Stock Corporation Law, Section 47 50
North Carolina Gen. Stat. 1943, Section 55-107 50
North Dakota Rev. Code 1943, Section 16-1214 71
Ohio Code Ann. (Throckmorton's) 1940, Sections 4785-82, 4785-129, 8673-3 ..... 50, 71
Oklahoma Stat. 1941, Title 26, Sections 63, 256 71
Oregon Comp. Laws Ann., Sections 81-111, 81-1605 71
Pennsylvania Stat. Ann. (Purdon's), Title 25, Sections 623-38, 807-137, 809-37, 3050 ..... 49, 71
South Dakota Code 1939, Sections 16.0225, 16.1207 71
Tennessee Code Ann. (Williams') 1934, Section 2078 71
Texas Civil Stats. Ann. (Vernon's), Art. 3006 71
Utah Code Ann. 1943, Sections 18-2-39, 25-3-35, 25-6-18 ..... 50, 71
Vermont Public Laws 1933, Section 118 49
Washington Revised Stat. Ann. (Remington's), Section 5325 71
West Virginia Code 1943, Sections 80, 118 ..... 49, 71
Wisconsin Stat. 1945, Sections, 6.50, 6.52 71
Miscellaneous:
Annual Reports, National Labor Relations Board:
First Annual Report, p. 44 55
Second Annual Report, p. 29 55
Third Annual Report, pp. 47, 147 ..... 38, 55
Fourth Annual Report, p. 51 55
Fifth Annual Report, p. 18 55
Sixth Annual Report, p. 36 55
Seventh Annual Report, pp. 32, 33, 34 ..... 53, 55
Eighth Annual Report, p. 24 55
Ninth Annual Report, pp. 16, 20 55
Tenth Annual Report, pp. 8, 10 ..... 53, 54, 55
Ballantine, *Corporations* (1927), Section 170, p. 569 50
Constitutionality of Statutes in Relation to Registration Before Voting at Election or Primary, 91 A. L. R. 349 31
Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1414 44
5 Fletcher, *Cyclopedia of Corporations* (perm. ed.), Sections 2017, 2028, 2044, pp. 83, 155 50
H. Rep. No. 1147, 74th Cong., 1st sess., pp. 21, 22 ..... 28, 44

Annual Reports, National Labor Relations Board—Con.. Page

Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943):

Article III:

Section 1 78
Section 3 78
Section 6 78
Section 8 78
Section 9 79
Section 10 ..... 40, 69, 79
Section 12 ..... 4, 26, 54, 81

S. Rep. No. 573, 74th Cong., 1st sess., p. 13 28

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 60

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 118–123) is reported at 152 F. 2d 275. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 10–16) are reported at 60 N. L. R. B. 1414.

JURISDICTION

The decree of the court below was entered on December 13, 1945 (R. 124). The petition for a writ of certiorari was filed on March 13, 1946, and granted on May 6, 1946 (R. 124). The juris-

diction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, after a union has received a majority of the votes cast in an election held in accordance with the regulations of the Board to determine the bargaining agent of certain employees, may, without examining into the merits of a post-election challenge to the eligibility of a voter in the election whose ballot may have been essential to the result, properly find that the employer has committed an unfair labor practice by refusing to bargain with the union.

2. Whether a regulation of the Board to the effect that after a petition to investigate and certify under Section 9 (c) of the Act has been filed, the parties may, with the approval of the regional director, enter into a consent election agreement, in which event the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious, is valid.

3. Whether, if the above regulation is valid, it was arbitrary and capricious for the regional director to rule that the employer was precluded

from questioning the employee status of a person who voted in an election conducted by secret ballot where the employer included that person's name on the list of those eligible to vote, had in his possession prior to the election the information on the basis of which he later attempted to challenge the status, permitted all of the votes to be cast and commingled without challenging any, and waited until the results of the election were announced to raise the question of eligibility.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set forth in the Appendix, *infra*, pp. 75–82.

STATEMENT

I

THE REPRESENTATION PROCEEDING

On April 24, 1944, Local No. 24, Waterproof Garment Workers Union, affiliated with the International Ladies Garment Workers Union, A. F. of L., herein called the Union, filed with the Board (in a proceeding designated by the Board as Case No. 1–R–1880) a petition for investigation and certification of representatives under Section 9 (c) of the Act, seeking exclusive representation of certain employees of the respondent (R. 37, 102–103). On April 27, 1944, an agree-

712662—46—2

ment for a "consent" election in accordance with Article III, Section 12, of the Board's Rules and Regulations, Series 3, effective November 26, 1943 (*infra*, pp. 81–82), was entered into between the respondent and the Union and approved by the Board's regional director (R. 37, 104–106). The agreement provided that an election by secret ballot should be conducted on May 5, 1944, under the supervision of the regional director, to determine whether the employees at respondent's Roxbury plant in the unit defined in the agreement desired to be represented by the Union (R. 37, 104). The agreement specified that (R. 37, 104):

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

The qualifications for participation in the election were stated in the agreement as follows (R. 37, 104–105):

> The eligible voters shall be those employees included within the Unit, who appear on the Employer's pay roll for the period indicated below, including employees

> who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

The pay-roll period for determining eligibility was designated as April 21, 1944 (R. 37, 105).

Challenges to the eligibility of voters were specifically provided for (R. 37, 105):

> Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

With respect to the procedure to be followed in the event of such challenges, the agreement provided (R. 37, 105);

> If challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon.

The agreement also sets forth the procedure to be followed in the event any party sought to question the regularity of the voting or the count of the ballots, by providing that (R. 37, 105);

> Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him.

If the election resulted in the choice of a bargaining agent, the agreement directed that the regional director should "issue a Consent Determination of Representatives to the parties, setting forth the name of the labor organization which has been designated and selected as the exclusive representative of all the employees in the Unit for the purposes of collective bargaining" (R. 37, 105–106).

Pursuant to the terms of the agreement, on May 1, 1944, the respondent submitted to the regional director a list of those employees whom

it considered eligible to vote in the election (R. 37, 48, 65, 109–111). The balloting took place on May 5, 1944 (R. 35–37, 101, 107). Respondent and the Union each had observers present throughout the casting of the ballots and their counting and tabulation (R. 35–36, 72, 101). At the close of the voting, a "Certification of Conduct of Election" was signed by the representatives of the respondent, the Union, and the Board; it contained the statement that the "undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting" and that they "certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote" (R. 37, 106–107, 111). Following the counting of the ballots, all the parties signed a "Tally of Ballots," in which the regional director certified that the results of the tabulation of the ballots cast in the election were 230 valid votes counted, 116 votes cast for the Union, 114 votes cast against it, and one challenged ballot (R. 35–37, 101, 107–108). At the bottom of the tally, the observers for the respondent and the Union stated that they had acted as authorized observers in the counting and tabulating of the ballots and certified "that the counting and tabulating were fairly and accurately done, that the

secrecy of the ballots was maintained, and that the results were as indicated above" (R. 37, 108).

On May 9, 1944, the respondent, through its counsel, wrote the regional director stating that "subsequent to the election * * * it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company" (R. 80, 114). The letter proceeded to explain that Mrs. Kane was employed by the respondent from March 16, 1943, through March 24, 1944, but that after the latter date she "did not ever again report for work at the Tower Company and did not appear at the plant of the Tower Company until she appeared for the purpose of voting on May 5, 1944" (R. 80, 114). The letter admitted that the respondent, "not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill, and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote" (R. 80, 114). As the basis of the respondent's belief that Mrs. Kane was no longer an employee, the letter recited that "it has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that

claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job'. The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment" (R. 80, 114).

In the letter, the respondent further stated that "in the light of the above facts the Company hereby challenges the right of Mrs. Kane to vote in the election of employees at its plant and challenges the ballot cast by her" (R. 80, 114). The letter pointed out that "in the election * * * there was one ballot challenged by the Union which challenge was not passed on because it had appeared that the Union had won the election by two votes. In view of the fact that it would now appear that one person, not an employee of the Tower Company, had voted in this election, this ballot challenged by the Union may materially affect the final election result" (R. 80, 114–115). The letter concluded with the following request (R. 80, 115):

> Accordingly, on behalf of the Company, I hereby request that a hearing be held for the purpose of passing upon this challenged ballot. If the challenge is not sustained and the ballot, upon being opened for the purpose of counting, proves to be

a vote against the Union, it will become material to rule upon the challenge which the Company hereby makes to the vote of Mrs. Kane and the Company requests that a hearing upon such challenge be held.

A conference for the purpose of considering the matters raised by this letter was held on May 12, 1944, and a hearing thereon was conducted under the auspices of the regional director on May 22, 1944, at which representatives of the respondent, the Union and the Board were present (R. 35, 101–102).[1] On May 24, 1944, the regional director issued his "Report on Objections" in which he found that the list of eligible voters used in the election was prepared solely by respondent (R. 37, 111); that the list was submitted on May 1, 1944, by the respondent as "a complete list of employees of the A. J. Tower Co. on the pay roll of April 21, 1944, who were in the unit designated in the consent agreement for an election to be held May 5, 1944" (R. 37, 110); that respondent included Mrs. Kane's name on this list as it assumed she was ill since she had never advised the respondent of any intention on her part to leave its employ (R. 37, 109); that respondent made no attempt,

[1] As is customary under consent election procedures, the hearing was informal in character and no record was made of what transpired. No party has raised any question as to the entire propriety of its conduct. Indeed, counsel for the respondent, during the hearing on the subsequent un-

between May 1 and May 5, 1944, to remove Mrs. Kane's name from the list,[18] although four or five days before the election respondent received by mail a notice of Mrs. Kane's claim for unemployment compensation which the respondent later urged as the basis for determining that Mrs. Kane was not an employee when she voted (R. 37,

---

fair labor practice charge, expressly conceded that the hearing held by the regional director was fair and impartial, that the respondent was afforded full opportunity to present all the evidence it desired and that it was in no way attacking the procedure followed (R. 51, 78). At the formal hearing on the unfair labor practice charge, of which a complete record was made, respondent was permitted to introduce all of the evidence bearing on the matters raised in its letter of May 9, 1944, see *supra*, pp. 8–10, (R. 38–83, 100–102, 116–117), not for the purpose of trying *de novo* the issues decided by the regional director but for the purpose of determining whether his ruling was arbitrary and capricious.

[18] It has been conceded throughout that Mrs. Kane's name was on the list. While the regional director seems to have omitted any express affirmative finding of this fact, he did find that respondent "did not exclude her from the list they believed eligible to vote" (R. 37, 109) and that four or five days prior to the election, the respondent knew she had applied for unemployment compensation but did "nothing to correct the eligibility list" (R. 37, 111). At the subsequent unfair labor practice hearing, respondent's witnesses testified that respondent had included Mrs. Kane's name on the list it submitted and had placed the words "Out Sick" on the list after her name (R. 39, 58, 65). The consent election agreement expressly included among the eligible voters, "employees who did not work during such pay-roll period because they were ill" but "excluding any employees who have since quit" (R. 37, 104).

111);[2] that respondent had two of its representatives, accompanied by company counsel, at the election as observers (R. 37, 110);[3] that the Board agent conducting the election had instructed these representatives of the respondent of their right to challenge any ballot (R. 37, 110); and that Mrs. Kane cast her ballot in the election in the presence of these observers who did not challenge her right to vote (R. 37, 111). The regional director also found that prior to the count of the ballots, the respondent's observers conferred with counsel when asked to certify that the election had been properly conducted, and after approval by counsel, both signed the usual Certification on Conduct of Election (R. 37, 111).

The Report on Objections noted respondent's contention that, irrespective of any oversight or neglect on its part, the vote cast by Mrs. Kane

[2] The notice of claim mailed to respondent on May 1, 1944, was received in evidence at the hearing in the unfair labor practice proceeding (R. 59–60) and it disclosed that the form application filed by Mrs. Kane had been filled out giving "Date of Separation" from the respondent as March 1944 and "Reason for Separation" as "Left—Couldn't continue to do heavy work of carrying bundles which was part of her job" (R. 60, 116).

[3] At the hearing in the unfair labor practice proceeding, witnesses called by respondent identified the two company observers as a company pay-roll clerk and a factory office clerk (R. 72–73), and testified that whether an employee had been absent from work for a long period of time was within the knowledge of these two employees as part of their duties for the respondent (R. 73).

was ineligible beyond question (R. 37, 109) and noted also respondent's offer to support this contention by a statement signed by Mrs. Kane on May 8, 1944, in the presence of witnesses, in which she said that she "left the employ of A. J. Tower Co. in March 1944, because of sickness and have been treated by Dr. Theodore who found that I was not able to engage in any gainful occupation. I applied for social security benefits because of this. I signed a paper for the Union at the Tower Co. as I felt it was a good thing. I voted for the Union at the election on last Friday. I have not worked since leaving the Tower Co. because of my physical condition" (R. 37, 109).

The Report on Objections then stated that an agent of the Board interviewed Mrs. Kane on May 23, 1944, and was told by her that (R. 37, 109–110):

> On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think that my application for unemployment benefits would be considered a termination from the Company. I am 64 years of age and have a certificate from my physician as to my general poor health. On May 5,

1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself as an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co.

On May 8, 1944, Mr. Ellberry of the Co. and another gentleman whose name I've forgotten visited me at my home and questioned me. I informed them that I thought the Union was a good thing but I do not recall ever telling them exactly how I voted at the election. I have read a copy of a statement that I signed on May 8, 1944, for Mr. Ellberry but my words have been misconstrued. I did say "I applied for social security benefits because of this" but the sentence should have been continued to show it was because of my sickness and not infer that I had left the Company because the work was too heavy.

Shortly after I took sick, I wrote a note to Miss Stone, in the office of the A. J. Tower Co., which Miss Higgins a fellow employee carried for me. In the note, I told Miss Stone that I was under a doctor's care and that I intended to return to the Company as soon as I was well.

Incidentally, when Mr. Ellberry was at my home on May 8, 1944, I told Mr. Ellberry that I intended to return to my job as soon as I was able * * *.

The regional director pointed out that, despite Mrs. Kane's statement to the agent of the Board,

subsequent investigation confirmed the fact that Mrs. Kane did advise the Division of Employment Security on April 28, 1944, that she had left her employment with the Company in March and that the reason stated was her inability to do the heavy work of carrying bundles (R. 37, 110). The regional director, however, also found that a notice of Mrs. Kane's claim for unemployment compensation was sent to the respondent by the United States Employment Service on May 1, 1944 (R. 37, 110). He pointed out that the respondent contended that it did not know when it received this notice, but did not deny that the notice was received prior to the date of the election; accordingly, the regional director found that respondent failed through oversight to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared to cast her ballot (R. 37, 112).* He further observed that "Whether or not Mrs. Kane was an employee entitled to vote was, under the circumstances, a

* The finding as set forth above is contained in an amendment to the Report on Objections which the regional director made on May 31, 1944, as the result of a letter dated May 26, 1944, from counsel for respondent, who objected to the manner in which the regional director had worded this paragraph in his original report (R. 37, 112). Before it was amended the paragraph read (R. 37, 110):

> The Company contends that it does not know the exact date of receipt of the notice of claim, but concedes that it was undoubtedly received prior to the day of the election, and that it failed through over-

fact peculiarly within the Company's knowledge. Yet it was not until four days after the election that they raised any objection to her vote" (R. 37, 111).

The regional director concluded his Report on Objections by ruling that "although the question of Mrs. Kane's status as an employee is not clear * * * under the circumstances set forth, the Company has waived its right to challenge her vote or to object to the election on this ground. To hold otherwise would vitiate the Board's procedure of having observers present at the polls, and challenges by such observers; and of certifications of conduct by the parties". (R. 37, 111.)

This determination made it unnecessary for the regional director to comply with respondent's re-

---

sight to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls.

As amended the paragraph reads (R. 37, 112):

> The Company contends that it does not know the exact date of receipt of the notice of claim, but does not deny that it was received prior to the date of the election, and in opinion of the undersigned it failed, through oversight, to correct the voting list or challenged the eligibility of Mrs. Kane when she appeared at the polls.

No point with respect to this amendment was made by respondent during the unfair labor practice proceeding. Indeed, the position taken by respondent's representatives in that subsequent proceeding makes it seem likely that respondent's desire to have the paragraph in its amended form rather than its original form was more a matter of technicality than of substance (See R. 56–60, 65–69).

quest that he rule on the ballot previously challenged by the Union at the polls, since it could not affect the clear majority of the Union (R. 37, 111). Accordingly, he found that the Union had received a majority of the valid votes cast and that it was, therefore, the exclusive representative of all the employees in the appropriate unit (R. 37, 111).

II

THE UNFAIR LABOR PRACTICE PROCEEDING

On June 9, 1944, the Union filed with the Board (in a proceeding designated by the Board as Case No. 1–C–2416), a charge alleging that the respondent had refused to bargain collectively with it (R. 34, 96–97). The Board thereupon issued its complaint against respondent, and respondent answered admitting that it had refused to bargain collectively with the Union but denying that the Union had ever been designated by a majority of the employees in the appropriate unit (R. 34, 94–96, 98–99). The answer asserted that the result of the consent election of May 5, 1944, could not be relied on as establishing the Union's representative status because if Mrs. Kane's vote were subtracted from the vote received by the Union and if the ballot challenged by the Union were opened upon overruling the challenge and proved to be against the Union, the outcome of the election would be a tie vote (R. 34, 98–99).

At the hearing before the trial examiner, the attorney for the Board introduced a stipulation signed by all parties which recited the facts pertaining to the representation proceeding and the subsequent request of the Union for bargaining and respondent's refusal to bargain "until the Union shall have been validly chosen as the bargaining agent of the majority of the employees in the unit in which the election was held" (R. 35, 100–102).

After the usual proceedings, the Board, on March 23, 1945, issued its findings of fact, conclusions of law, and order (R. 10–16), holding that it would not disturb the rulings of a regional director on questions arising out of a consent election unless such rulings appeared to be unsupported by substantial evidence or were arbitrary or capricious, and that the record in the instant case presented no such grounds for disturbing the ruling of the regional director that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced (R. 11). The Board, as an alternate basis of its decision, pointed out that, quite apart from the effect of the consent election agreement, the Board itself would have reached the same conclusions as the regional director respecting Mrs. Kane's vote (R. 11–12). The position of the Board respecting such post-election challenges is stated in its decision as follows (R. 12):

> We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result. Moreover, a post-election challenge forecloses identification of the ballot which would otherwise have been segregated. Since the challenged ballot may have been cast against the Union, [evidence as to how it was cast being unacceptable,] it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

The Board therefore entered an order requiring respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the Union (R. 13–16).

Upon the Board's petition for enforcement of its order, the court below construed the National Labor Relations Act as making it a jurisdictional prerequisite to any determination that an employer has committed the unfair labor practice of refusing to bargain collectively, that the union

with which he has refused to deal should have been chosen by a majority of those voting who were in fact employees (R. 121). The court therefore concluded that, under the facts of the case, "the Board had no jurisdiction to find the Company guilty of violating Section 8 (5) in the absence of a finding that Mrs. Kane was an employee on the date stipulated" (R. 121–122). It accordingly set aside the Board's order and remanded the cause to the Board for further proceedings not inconsistent with its opinion (R. 123).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In construing the National Labor Relations Act as making it a jurisdictional prerequisite to any determination that the respondent committed the unfair labor practice of refusing to bargain collectively, that the Board find that Mrs. Kane was in fact an employee on the date she cast her ballot in the election conducted by the Board's regional director.

2. In holding that although there is no reliable method of determining for whom Mrs. Kane voted, since her ballot was commingled with the other 230 ballots, the court must assume she voted for the Union.

3. In holding that the Board must consider the post-election challenge of Mrs. Kane's eligibility to vote in the election.

4. In holding that the Board could not give effect to the consent election agreement entered into between the Union and the respondent insofar as it made the rulings of the regional director final and binding on all questions as to the conduct of the election.

5. In holding that the Board could not treat, as final and binding, the regional director's ruling that respondent, by failing to challenge Mrs. Kane's right to vote prior to the time her ballot was commingled, had waived its right to question her eligibility.

6. In holding that the Board was required to go behind the findings of the regional director, made under the terms of a consent election agreement entered into between the Union and the respondent, that the Union is the exclusive representative for purposes of collective bargaining of the employees in the unit specified in the consent election agreement.

7. In holding that the Board must determine whether Mrs. Kane was an employee of the respondent on the eligibility date and on the date she voted.

8. In setting aside the Board's finding that the Union was the exclusive representative for purposes of collective bargaining of the respondent's employees in an appropriate unit.

9. In setting aside the Board's finding that the respondent had committed an unfair labor prac-

tice by refusing to bargain collectively with the Union.

10. In setting aside and refusing to enforce the Board's order.

SUMMARY OF ARGUMENT

I

Congress left to the Board the task of fixing rules to govern the conduct of elections in which employees might choose representatives for purposes of collective bargaining. So long as the rules adopted by the Board afford reasonable assurance that only those eligible to participate in the election will do so, they are not vitiated because some possibly unqualified person does in fact vote. The Board's election procedures allow all interested parties to raise any question of eligibility at any time prior to the commingling of the ballots. Such issues may be raised and settled by the consent election agreement or the decision and direction of election. They may also be raised at the time the eligibility list is prepared by the employer and submitted to other parties. And at the time the voting takes place, still a third opportunity is afforded all interested persons to challenge any person who seeks to cast a ballot. The employer and the contesting unions usually have observers present at the election for the purpose of challenging voters. If such a challenge is made, the ballot of the questioned voter is segre-

gated so that its identity will not be lost through commingling with the other ballots. The eligibility of the challenged voter is only decided if the results of counting the unchallenged ballots are so close as to make it possible that the challenged ballots may affect the outcome. If it is then decided that the challenged voter is eligible, his ballot is opened and counted. If it is decided that he is ineligible, his ballot is never opened.

This procedure affords reasonable assurance that only eligible persons will vote. The harmful consequences which would flow from a procedure which permitted questions of eligibility to be raised after the ballots had been commingled far outweigh any advantages to be gained from such a procedure. Since the identity of the ballot has been lost, there is no accurate means of determining how the ballot was marked. Inquiries of the voter are unreliable, invade the secrecy of ballot, and subject the voter to risks of incurring employer or union disfavor. The Board has decided, therefore, not to try the issue of how an unchallenged voter marked his ballot. Were the Board to permit post-election challenges to eligibility, it would have to set aside the results of the election and conduct a new election whenever an unqualified voter cast an unchallenged ballot. Such a course violates all the principles of finality of elections. If the point of commingling the ballots is not properly the limit for raising chal-

lenges to eligibility no later point of time can be fixed with greater validity. An election would therefore never be final unless the Board undertook the laborious task of ruling on the qualification of each voter. The number of voters casting ballots in its elections makes this an impossible task.

The Board's refusal to accept post-election challenges is supported by many cases applying a similar rule in political and corporate elections. There is even more reason to follow this rule in elections to choose collective bargaining representatives because otherwise unscrupulous employers, through their control over pay rolls, would have an inducement to supply eligibility lists containing the names of anti-union workers who have ceased to be employed in the hope that, if the union won, the election would have to be set aside because of the possibility that the unqualified voters cast their ballots for the union.

II

Quite apart from the validity of the Board's refusal to accept post-election challenges, the respondent in the instant case is bound by the results of the election because it signed a consent election agreement. Both the Board's rules and regulations and the consent election agreement provide that in elections conducted under consent procedures, the rulings of the regional director

on all questions pertaining to the election shall be final. Such consent election procedures constitute an appropriate method for ascertaining bargaining representatives.

In the instant case, the regional director ruled that the respondent was estopped from challenging a voter after the balloting had ended. The Board analogized the consent election agreement to an arbitration agreement and held that the regional director's ruling, being neither arbitrary nor capricious, was binding on the respondent. The respondent had placed Mrs. Kane's name on the eligibility list, and had the facts, on the basis of which it urged that she was disqualified, in its possession for four days before the election without trying to correct the list. Moreover, while the respondent was represented at the balloting by observers, it allowed Mrs. Kane to vote without objection. These considerations, added to the fact that respondent's policy of continuing on its pay roll workers out ill was such as to make the question of Mrs. Kane's employee status on the date she voted a very close technical one, were sufficient to make the regional director's determination wholly reasonable.

ARGUMENT

The Board's decision in this case rests on two alternate grounds: (1) The respondent, having failed to show that the regional director's ruling with respect to the challenge to Mrs. Kane's vote

was arbitrary or capricious, is bound thereby under the terms of the consent election agreement (R. 11);[5] and (2) disregarding the consent election features of the case and testing the regional director's rulings by standards applicable in Board-directed elections, his ruling was "in complete accord with established principles and policy of the Board" (R. 12). The acceptance by this Court of either of these grounds would require that the decision below be reversed with directions to enforce the order of the Board. In this brief, we shall deal first with the second basis for the Board's decision and then with the first, more narrow, ground.

[5] In applying the provisions for finality of the rulings of the regional director in consent election cases—provisions found in Article III, section 12 of the Rules and Regulations (*infra*, pp. 81–82) and in the consent election agreement itself (*supra*, p. 4)—the Board refuses to disturb "rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11; cf., *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 159, enforced, 140 F. 2d 754, 758–759 (C. C. A. 6), certiorari denied, 322 U. S. 763), and upholds the regional director's rulings "regardless of how we might have determined the question if the respondent had not authorized the Regional Director to determine it" (*Matter of Aetna Firebrick Co.*, 56 N. L. R. B. 849, 854).

I

THE BOARD, BY STANDARDS APPLICABLE IN BOARD-DIRECTED ELECTIONS, PROPERLY REFUSED TO ENTERTAIN THE POST-ELECTION CHALLENGE TO MRS. KANE'S ELIGIBILITY

Whether a union has been selected by a majority of eligible employees is an issue, the resolution of which has been largely committed by Section 9 (c), *infra*, p. 76, to the Board.[6] Section 9 (c) authorizes the Board to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives", and, in so doing, the Board is, we believe, empowered to adopt and execute such reasonable policies and practices as will serve, in the great mass of cases that come before it, to ensure an accurate, efficient and speedy determination of the wishes of the majority.

This Court, in construing Section 2, Fourth, of the Railway Labor Act, which, much like Section 9 (a) of the Wagner Act, *infra*, pp. 75-76, provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", found that Congress intended to adopt the principle of political elections, under which a majority of those voting in an election, although less than a majority of

[6] See *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 380.

the eligible voters, are accorded the right of determination. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 560. The legislative history of the National Labor Relations Act also makes it clear that, in Section 9 (a), Congress intended to adopt the majority rule principle sanctioned by "governmental practices" and "democratic institutions". S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. It follows, we think, that the standard by which the legitimacy of the Board's election practices, as applied in this case, is to be judged, was intended to be the same as that generally accepted with respect to political and corporate elections—a standard of reasonableness. The court below fell into error when it failed to apply this standard and rested its decision solely on a literal reading of Section 9 (a). This reading of Section 9 (a) is inconsistent with the decision of this Court in the *Virginian Railway Co.* case and the uniform decisions of many circuit courts of appeals[7] holding that the major-

[7] *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. 2d 586, 588 (C. C. A. 2), certiorari denied, 313 U. S. 594; *National Labor Relations Board* v. *The Standard Lime and Stone Co.,* 149 F. 2d 435 (C. C. A. 4), certiorari denied, 326 U. S. 723; *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. 2d 474, 477–478 (C. C. A. 5); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. 2d 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *Central Dispensary and Emergency Hospital,* 145 F. 2d 852 (App. D. C.), certiorari denied, 324 U. S. 847.

ity rule requirement is not so absolute as to forbid a practical adjustment by which the desires of a majority of employees actually voting may control. The entire scheme of the National Labor Relations Act persuasively indicates that Congress was not undertaking "the impossible task of specifying in precise and unmistakable language each incident"[*] but, rather, was merely adopting certain basic concepts to be implemented by the Board in dealing with the problems which came before it.

Majority rule as a principle for governing any group, whether for political, corporate, fraternal or collective bargaining purposes, is only workable when more or less formal machinery is established for the periodic recording of the desires of those to be governed. Since no one has yet devised a litmus paper which will automatically indicate changes in the sentiment of any group of people, the accepted device for ascertaining the will of the majority is the election. Experience with elections over the years has shown that the fairest determination of the will of the majority occurs when there is secrecy of ballot, all questions respecting eligibility to vote are determined prior to the casting of ballots, and the results of the election when announced are given

---

[*] *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 798.

complete finality. That departure from any of these standards substantially impairs the chances that the outcome of the election will actually reflect the desires of the electorate hardly requires elaboration. Any procedure which allows questions of eligibility to be raised after ballots have been commingled impairs the secrecy of the count.

The machinery devised in political elections to insure secrecy of the ballot and to settle all questions of eligibility before the casting of the ballot, while differing in detail as it is utilized in the various states, follows basically the same principle. There is either the government printed ballot, which in order to secure uniformity so that no ballot bears identifying marks, permits no writing on its face except the making of one or more X marks in appropriate boxes, or, more recently, the voting machine. There is the registration list, which is closed a certain number of days before the election, during which time it may be publicly inspected and hearings held to determine whether questioned registrants should be purged from the list. When advocates of fair elections first introduced these devices, attacks upon the legality of the registration device, among others, were frequently made because they introduced departures from literal concepts of majority rule. In a few of the first cases to come before the courts, registration statutes were even held unconstitutional because those who became otherwise eligible

between the date of closing the registration books and the election, as by moving into the jurisdiction or reaching voting age or acquiring the requisite property, were disenfranchised. In other words, the use of the registration device fixed the electorate as of the last day for registration whereas the election purported to record the will of the electorate as of another date. But soon courts came to realize that such departures from literal majority rule caused little harm as weighed against the abuses which could only be corrected by registration lists. Accordingly, the test for judging the constitutionality of such statutes became solely their reasonableness, not whether they failed to make the election a record of a literal majority of the actual electorate on the date ballots were cast.[9] Judged by the test of reasonableness, we submit that the Board's rules respecting post-election challenges are valid.

A. *The election procedures established by the Board afford reasonable assurance that only eligible persons will vote.*—The determination as to whether any given rule governing the conduct of an election is reasonable can only be made when the abuses which that rule is designed to correct or eliminate are understood. Whereas in political elections the chief abuses towards which most modern election reforms are directed arise from

[9] See cases collected in *Constitutionality of Statutes in Relation to Registration before Voting at Election or Primary*, 91 A. L. R. 349.

corrupt political machines, in elections conducted by the Board, the chief abuses against which the Board must guard arise from the fact that the employer can control the number of employees who are within the unit from one day to another by increasing or decreasing the number he hires.[10] So the Board in each case must select the date as of which the employee group to constitute the electorate is to be fixed. In consent elections, the date is fixed by agreement of the parties and approval of the regional director. In Board directed elections, the Board tries in a formal hearing the issue of the date to be chosen for this purpose. The Board's resolution of this issue normally takes the form of designating the payroll of a fixed date, which is known as the eligibility date.

But besides determining the date of the pay roll, the Board also makes certain rulings as to the scope of the electorate and as to eligibility

[10] For express Board recognition of this fact, see *Matter of Elliott Bay Lumber Co.*, 9 N. L. R. B. 3, 4: "The Board considers that except under unusual circumstances, the choice of an eligibility date prior to the hearing is desirable in order to insure an eligibility list free from the possibility of changes effected subsequent to the hearing in order to influence the results of the election." As is usual in consent election agreements, the eligibility date here agreed upon antedated not only the signing of the agreement but also the beginning of the representation proceedings. The petition for certification of representatives was filed on April 24th (R. 37, 103), the agreement was signed on April 27th (R. 37, 106), and the eligibility date was April 21st (R. 37, 105).

qualifications, all of which may result in additions to or subtractions from the pay roll as maintained by the employer. The scope of the electorate is resolved by determining which occupational groups or classes constitute an appropriate unit for purposes of collective bargaining. The Board regards the determination as to whether a position involving fifty percent supervision and fifty percent manual labor should fall within the unit of production and maintenance employees or within the unit of supervisors as essentially a unit problem rather than an eligibility problem.[11] Eligibility issues, as distinguished from unit issues, involve questions not as to the type or kind of work a person does but whether the person has sufficient tenure of employment to justify his participation in the election. The Board regards as an eligibility problem the determination whether temporary, intermittent, probational, part-time or laid off employees, who perform work of the type within the unit, should be

[11] See, for instance, *Matter of Holgate Brothers Company*, 31 N. L. R. B. 485, 487 (foremen doing manual labor excluded from a unit of production and maintenance employees when none of them spend more than twenty-five percent of their time in actual production work); *Matter of Virginia Bridge Co.*, 29 N. L. R. B. 241, 244 (unit of production and maintenance employees defined to exclude foremen who spent at least fifty percent of their time in actual supervisory duties).

held qualified to vote.[12] The function of deter-

[12] See for instance, *Matter of Mobile Steamship Ass'n*, 8 N. L. R. B. 1297, 1318–1319 (longshoremen, banana handlers, clerks and checkers who worked in each of any eight weeks during a six month period preceding the Board's decision held eligible); *Matter of Monon Stone Company*, 10 N. L. R. B. 64, 74 (in election covering quarry workers of 14 companies employees who had worked for at least 60 days during year preceding Board's decision held eligible with proviso that where employee had worked for more than one of the 14 companies he was to vote in unit covering company with which he had worked the longest aggregate period); *Matter of KMOX Broadcasting Station*, 10 N. L. R. B. 479, 485 (radio artists who performed before microphone in any regular program at any of four radio stations involved at any time during three month period preceding Board's decision held eligible); *Matter of Rock River Woolen Mills*, 18 N. L. R. B. 828, 834 (employees laid off because of installation of new machinery, whose likelihood of reemployment was slight, held not eligible); *Matter of Standard Oil Co.*, 23 N. L. R. B. 860, 865 (where company was conscientiously attempting to reinstate seamen laid off as result of transfers of ships made after the passage of the neutrality laws shortly after the outbreak of war, Board ruled they were eligible to vote); *Matter of Walton Lumber Co.*, 20 N. L. R. B. 573, 576 (seven employees, assigned as watchmen for another company which had assumed part of the premises of the company involved in the representation proceeding for the purposes of securing a loan, held eligible where they were expected to return to the company's pay roll upon termination of the security arrangement); *Matter of American Steel Scraper Co.*, 21 N. L. R. B. 218, 220–221 (employee held eligible where he had been laid off and secured other, but inferior, position, and had expressed preference for his original job and company indicated he was likely to be reemployed); *Matter of Home Mfg. Co.*, 26 N. L. R. B. 916, 919 (although the company kept a list of competent persons laid off each season with intent to secure their services at the beginning of the following seasons, few such employees were in fact available for reemployment from year to year and they were held ineligible).

mining appropriate units may be analogized to the function of establishing the jurisdictional boundaries of political subdivisions. Both of these functions serve to fix the outside boundaries within which the electorate must fall as well as to define the group of persons who will be governed by those elected. And just as in political jurisdictions those who will be governed by the laws applicable to the jurisdiction outnumber those eligible to vote, so also in collective bargaining elections, those who are bound by the terms of any collective bargaining contract applicable to the unit may exceed those deemed qualified to vote; thus casual or part-time workers or those hired subsequent to the eligibility date may be in the unit but may not be eligible to vote.[13] The resolution of eligibility issues for elections to choose representatives for purposes of collective bargaining may be analogized to such features of the political election as the setting and applying of standards of citizenship, residence or age.

[13] For express recognition by the Board that, although all persons performing the functions of the workers within the unit are to be regarded as within the unit and therefore subject to the terms of the collective bargaining agreement applicable to the unit, some of these persons may work so intermittently as not to justify granting them a vote, see *Matter of Wadham's Division of Socony Vacuum Oil Co.*, 54 N. L. R. B. 1164, 1167–1168; *Matter of The Post Printing and Publishing Co.*, 59 N. L. R. B. 1115, 1120–1121.

The Board's procedures are designed with the objective of having available at the time the voters present themselves for the casting of their ballots, a list of those eligible which is entirely accurate in every respect. To this end, at several stages of the preparation for the holding of the election, steps are taken to iron out all issues respecting eligibility. When a formal Board hearing precedes an election, all parties are urged to try before the Board all questions of eligibility which they anticipate will arise at the election. Then the Board, in its decision and direction of election, rules on all such issues raised. But, so long as the later challenge is made at or before the election, no one is barred from raising any eligibility issue because of failure to raise it in such a hearing, even though he knew all the facts and withheld them. In consent elections, the parties are able to agree on all the issues either party has raised prior to the signing of the agreement and this agreement is approved by the regional director. If the parties cannot agree, they usually do not sign such an agreement but go to formal hearing before the Board. After the Board decision and direction of election is issued or the consent election agreement is signed, the next step is the actual preparation of the list for use in checking voters at the election. To this end, the regional director at once secures from the employer both a list of the eligible employees on

the pay roll on the eligibility date set by the Board or fixed in the consent election agreement as well as a list of those on the pay roll who are not eligible.[14] The Board then prepares an eligibility list in conformity with the voting scheme adopted for the election. Thus, in the event voting is to be done by departments, the list is arranged by departments. The listing is alphabetical, unless the workers' familiarity with their clock numbers permits a numerical arrangement. After the list has been secured, a conference is arranged for the purpose of affording all parties an opportunity to check it. The whole list or each portion agreed upon by all parties is appro-

[14] We are not here concerned with the procedure followed where the employer refuses to supply such a list. Sometimes the Board subpoenas the payroll. But in instances where the Board decides that the election should proceed without awaiting subpoena action, it has an established procedure for "voting by affidavit," where the Board agent present at the election examines each person claiming eligibility as to his identity and qualifications and then has him execute an oath respecting his eligibility in affidavit form. See for example, *Matter of Cushman Shoe Co.*, 2 N. L. R. B. 1015, 1030; *Matter of Metro-Goldwyn-Mayer Studios*, 8 N. L. R. B. 858, 863; *Matter of Cudahy Packing Co.*, 26 N. L. R. B. 749, 27 N. L. R. B. 108; *Matter of National Mineral Co.*, 27 N. L. R. B. 432. The Board's procedure in the latter case received judicial approval in *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 428 (C. C. A. 7), certiorari denied, 320 U. S. 753.

priately initialed or signed.[15] While all parties are urged at this stage to raise all questions of eligibility of which disposition has not already been made, again failure to raise any issue, even though all facts are known, does not bar any party from making a challenge based thereon at the election.[16]

At the time the balloting takes place, the Board makes further provision for assuring that only those eligible will cast ballots. The employer and the union are each allowed to station an equal number of authorized observers at the polling places during the election who may challenge the eligibility of any person who applies for a ballot. The consent election agreement signed by respondent in the instant case specifically so provides (R. 37, 105).[17] The practice

[15] In the instant case the employer concededly was in full agreement with the list prepared, as it was in fact used in the exact form submitted by it (R. 48).

[16] Compare the decision of the New York State Labor Relations Board in *Matter of "Hunt" for Chevrolets*, Decision No. 3593, Case No. WE-421, July 8, 1946, 18 L. R. R. M. 1229, where that Board points out that it would have been better for the union to contest the employer's inclusion of an employee in the list prior to the election, but that since the union knew only part of the facts before election, the challenge was timely.

[17] Although the Board at one time followed the practice of refusing to permit employer representatives to be present at the polls if any union objected (see *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 32, 33, 37; National Labor Relations Board, *Third Annual Report*, p. 147), for the past three years it has permitted the employer

followed here, of having the observers fully instructed by members of the Board's staff, prior to the election, of their right to challenge any person seeking to cast a ballot whom they believe ineligible to vote (R. 37, 110), is also one generally followed by the Board in all elections. If any person's right to vote is challenged, he is allowed to mark a ballot but instead of depositing it in the ballot box with the other ballots where its identity would be lost, he is required to place it in a sealed envelope which is then marked to show whose ballot it contains. The Board has described this as "a simple and efficacious procedure" which effectuates "a separation of the ballot of the challenged voter for subsequent consideration of the Board without jeopardizing the entire election."[18] The segregated ballot is never opened unless the opposing votes are sufficiently close so that the challenged ballot might

---

in all cases to have observers selected from among the nonsupervisory employees. Indeed, it is the present policy of the Board to have its agents urge the employer, as well as all other interested persons, to have observers at the election. If the employer nevertheless fails to appoint an observer, the Board has on occasion asked the person responsible for preparing the eligibility list for the employer to serve as the employer's observer. See *Matter of Worcester Woolen Mills Corp.*, 69 N. L. R. B. No. 51.

[18] *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512; *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 867.

affect the outcome.[19] In the latter event, the regional director rules upon the challenges and, if the challenges are overruled, the envelopes are opened and the challenged ballots counted. If the challenges are sustained, the envelopes are never opened.[20]

We submit that the foregoing recital of the provisions which the Board has made to assure that only those who are eligible shall vote in its elections—provisions which were fully executed in the instant case (see *supra*, pp. 6–8, 9–10, 16–17)—demonstrates that the Board has not only afforded all parties reasonable opportunity to raise any issues of eligibility but has also taken reasonable precautions against abuse of its ballot box.

B. *The Board's refusal to entertain post-election challenges is a reasonable measure designed to assure secrecy of the ballot and finality of the election.*—If no issue of eligibility has been raised by any party prior to the time that the allegedly ineligible person casts his ballot, and its identity is thus lost by commingling with the other ballots, the Board refuses thereafter to entertain such an issue unless either the Board's agents or the party to benefit from the Board's refusal to entertain

[19] The manner in which the ballot challenged by the union in the instant case was handled (R. 37, 39, 52–53, 80, 81–82, 111, 115) is typical of Board procedure in such situations.

[20] The procedure respecting challenged ballots here described appears in the Board's Rules and Regulations, Article III, Section 10, which is set forth *infra*, pp. 79–81.

the issue knew of the voter's ineligibility and suppressed the facts.[21] Since there has never been even an intimation in the case at bar that anyone other than the respondent itself had any reason to suppose that Mrs. Kane might have been ineligible to vote, no attention need be given to the exact bounds of this exception to the Board's general practice of refusing to consider post-election challenges to the eligibility of persons who cast ballots.[22]

---

[21] In instances where a Board agent allows a person he knows to be ineligible to vote without challenge, the employer has a valid objection to the conduct of the election and the Board will set it aside and order a new one. This the Board did in *Matter of Wayne Hale*, 62 N. L. R. B. 1393, 1394, in which the employer, in support of his objection to the conduct of the election, showed that the union's observers and the Board's agents present at the election permitted a foreman, whom they knew the Board had specifically excluded from the unit, to vote without challenge, and that the employer did not have an observer present at the election. Similarly, in *Matter of Beggs & Cobb, Inc.*, 62 N. L. R. B. 193, 194–195, the A. F. L., in support of its objections to the conduct of the election, showed that the employer had notified the Board prior to the election that eight persons on the eligibility list were no longer in its employ, five of the eight appeared at the polling place, they were permitted to cast their ballots without challenge although the Board agents, company observers and C. I. O. observers present knew of their ineligibility but the A. F. L. did not, and the C. I. O. received three more votes than the A. F. L. in the election.

[22] The Board refused to entertain post-election challenges in the following cases involving Board-directed elections: *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739, 740; *Matter of Denver Publishing Co.*, 61 N. L. R. B. 338, 339; *Matter of Owens-Corning Fiberglas Co.*, 61

As the Board pointed out in its decision (R. 12), it has "consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." If any other doctrine were followed, in close elections it would be to the advantage of the losing union or the employer to raise issues and require proof as to the status of innumerable voters in the hope that doubt would be cast upon enough votes to require a new election. Since the Board's policy regarding eligibility permits numerous persons to vote even though they do not work on the day of the election, as, for example, employees temporarily laid off, or ill, or on vacation, or in the armed forces, it is apparent that the possibilities of attack on the eligibility of voters are varied and plentiful. Furthermore, if post-election chal-

N. L. R. B. 546, 551–552; *Matter of Harry Manaster & Bro.*, 61 N. L. R. B. 1373, 1374; *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 868; *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 511–512; *Matter of John Price, Sr.*, 67 N. L. R. B. No. 146; *Matter of Worcester Woolen Mills Corp.*, 69 N. L. R. B. No. 51; and in the following cases involving consent elections: *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852, 861 (alternative holding); *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 157–159, enforced, 140 F. 2d 754 (C. C. A. 6), certiorari denied, 322 U. S. 763.

lenges are permitted, the unscrupulous employer will be given a strong inducement to include on the payroll submitted the names of persons whose status as employees is dubious or non-existent in the hope that he can thereby invalidate the election. He may include the names of permanently laid off employees whom he knows to be anti-union, notify them to vote in the hope that some will escape challenge at the election, and yet raise the point thereafter that the election results are invalid because of their ineligibility and the possibility that they had voted for the union. In most instances of employees not working on the day of the election, neither the Board nor the union is in a position to know whether the employees have indicated to the employer an intention not to return to work or whether the employer has discharged them. The dangers of allowing post-election challenges by employers to the employee status of persons included by the employer on the payroll submitted for use in the election are much greater than those which attach to post-election challenges in other elections where the challenging party does not prepare the eligibility list.

Aside from the risk that the employer will knowingly include in the eligibility list persons of questionable employee status, the knowledge that the Board would entertain post-election challenges would lead parties to think of election

results, not as conclusive, but rather as an invitation to litigate eligibility issues. The election would cease to perform the healthy role which Congressional proponents of the bill which became the Act had in mind when they stated, "the device of an election in a democratic society has, among other virtues, that of allaying strife, not provoking it."[23] The vice of entertaining post-election inquiries into eligibility in political elections has been explained as follows:[24]

> * * * to allow such scrutiny is to hold out strong temptation * * * since * * * if an issue may be made on the right of every individual voter, it will be easy * * * to prolong a contest * * * and to keep perpetually before the courts the same excitements, strifes, and animosities which characterized the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls.

Nor are these all the harmful results which flow from permitting post-election challenges to eligibility. If the Board should hold a trial on the issue of eligibility and decide that the challenge was well taken, the problem would still exist as to whether the ballot cast by the disqualified voter did in fact affect the outcome of

[23] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22.

[24] Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1416.

the election. For if he voted for the losing side, the practical results of the election are no different than had he not voted. Since the identity of the ballot has been lost because of the failure to challenge prior to its commingling with the other ballots, there is no reliable method of determining how the ballot was marked.[25] Circumstantial evidence, such as the voter's statements prior to the election of his wishes respecting the outcome of the election or of his intention to cast his ballot for a given side, or his statements after the election of his pleasure or displeasure with the outcome or how he did in fact vote, has little probative value. Even the testimony of the voter himself as to how he marked his ballot may be almost worthless. As the Board stated in rejecting respondent's tender of a signed statement by Mrs. Kane that she voted for the Union (R. 12):

> Because of a reluctance to antagonize the employer or the Union, a voter knowing that his statement could not be verified, would not be likely to disclose the true state of his ballot.

The pressure on an individual voter called on to disclose his vote is varied. If there is only one union involved in the election and it is one which normally operates only on a closed shop basis, the employee would be afraid that the union's knowledge that he actually voted against it might

[25] The court below held (R. 119) that the case must be determined upon the assumption that the challenged ballot was cast in favor of the Union.

in the end cost him his job. And if the employer wished the voter to testify that his ballot was for the union, he could easily assure the employer that he had voted against the union but would happily testify that he voted for it. Even more conflicting pressures exist where there is more than one union seeking to represent the employees.

It should be noted, as illustrative of the uncertain import and credibility of such testimony by voters, that although the respondent produced a statement signed by Mrs. Kane in which she stated that she had voted for the Union (R. 37, 62–64, 71, 109, 117), a Board agent was subsequently told by Mrs. Kane that she did not realize that the statement she signed for respondent contained any affirmation that she voted for the Union (R. 88–89). An affidavit thereafter executed by Mrs. Kane averred that she did "not recollect ever telling them exactly how I voted at the election" (R. 37, 86, 109–110, 115). At the subsequent hearing in the unfair labor practice case, the trial examiner offered to issue a subpoena for Mrs. Kane but each of the parties expressly declined to call her as a witness (R. 53, 83, 85).

Not only is such an inquiry unreliable, but it has the further fault of violating the secrecy of the ballot. As its second reason for rejecting evidence as to how Mrs. Kane voted, the Board stated (R. 12):

> But what is even more important, we cannot sanction the respondent's invasion of the voter's privacy because such a practice would nullify the very purpose of the secret ballot to insure a free and untrammeled choice. Indeed, we would regard as an unfair labor practice an employer's questioning of his employees as to the manner in which they voted in a Board election.

A similar inquiry by agents of the Board would be only slightly less objectionable. The Board, therefore, follows the general policy of refusing to try the issue of how an ineligible person has voted (R. 12).[26] Were the Board to change its practice and receive post-election challenges to eligibility, it would also have either to change its practice of forbidding such invasions of secrecy of the ballot or conduct new elections, in any instance where the challenge proved well taken and might affect the result of the election. Should the Board permit employees to be publicly questioned in the presence of the employer as to how they voted, a serious impediment to free selection of collective bargaining representatives would be raised. Moreover, as to elections already conducted, such a change by the Board would amount to a real breach of faith with many

[26] Compare *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 868.

millions of the employees who have repeatedly been assured by the Board that they could come and vote in its elections and no one would ever know how any individual employee voted. As to future elections, the result would be to deter employees from voting since the Board would have to let them know that if post-election challenges were made, they might be called upon to disclose their vote. The Board has indicated that if it were to entertain post-election challenges it would not follow this alternative but would instead conduct a new election despite the unjust disfranchisement of all of those who voted in the first election which this might entail. The Board stated (R. 12):

> Since the challenged ballot may have been cast against the Union, it would be necessary, in order to sustain such a challenge, to set aside the election even though a majority of the valid votes have been cast for the Union. We do not believe it to be sound administrative practice to overturn an election under these circumstances when such a result flows from the fault of the objecting party.

There are many cases involving political elections which adopt similar reasoning in refusing to permit post-election challenges to voters whose names appeared on registration lists which could

have been corrected prior to the election. For instance a Louisiana court stated:[21]

> * * * Such an attack must be made prior to the primary election. A candidate should not be permitted to take the chances of securing such votes, and after realizing that he has failed to get them, attack their right to be registered. * * * The jurisprudence is not questioned that the attack on the right of a person to be on the registration roll, must be made before the election is held.

---

[21] *Duplessis* v. *Harrell*, 9 La. App. 471, 119 So. 264. See also *Cambre* v. *Brignac*, 19 La. App. 437, 140 So. 702; *Turregano* v. *Whittington*, 132 La. 454, 61 So. 525; *Perez* v. *Cognevich*, 156 La. 331, 100 So. 444; *Bradley* v. *Neill*, 174 La. 702, 141 So. 382; *Hyde* v. *Brush*, 34 Conn. 454; *Moore* v. *Bay*, 149 Md. 286, 131 Atl. 459; *Davis* v. *Town of Saluda*, 147 S. C. 498, 145 S. E. 412; *Re Port Arthur Provincial Election*, 14 Ont. L. 345; *Re McGrath*, 17 Ont. L. 514; *Re Schumacher*, 21 Ont. L. 522. A number of states have statutes barring election contests over the ineligibility of a voter in the absence of a challenge at the polls. For example see Del. Rev. Code 1935, Sec. 2023; Michigan Compiled Laws 1929, Secs. 3122, 3124; New Jersey Rev. Stat. 1937, Sec. 19:15–34. And some states bar a challenge at the polls of any person duly registered on any basis other than that the individual appearing is an impostor for the name registered or that he has been bribed. For example see Del. Rev. Code 1935, Sec. 1862; Conn. Rev. Stat. 1930, Sec. 602; Purdon's Pa. Stat. Ann., Title 25, Secs. 623–38, 807–137, 809–37, 3050 (also for change in residence since registration); Vermont Public Laws 1933, Sec. 118; W. Va. Code 1943, Secs. 80, 118 (or if disqualification occurs subsequent to registration).

In corporate elections, several states allow corporations to fix a date on which to close the corporate books prior to the election and by statute provide that the list of those persons who appear as stockholders on that date is conclusive evidence of the right to vote.[28] Other states provide that the transfer or stock books of the corporation shall be conclusive evidence of those eligible to vote.[29] It is the general rule in corporate elections that once a ballot has been cast without challenge and its identity therefore lost, its validity cannot later be questioned.[30]

The only case involving post-election challenges under the National Labor Relations Act which has been decided by the courts, other than the case at bar, is *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C. C. A. 6), certiorari denied, 322 U. S. 763. Since the Board there rested its decision solely on the consent elec-

[28] Montana Rev. Code 1935 Ann., Sec. 5971.1; Throckmorton's Ohio Code Ann. 1940, Sec. 8673-3; Utah Code Ann. 1943, Sec. 18-2-39.

[29] 5 Fletcher, *Cyclopedia of Corporations* (perm. ed.), Sec. 2028; Ballantine, *Corporations* (1927), Sec. 170, p. 569; *People* v. *Robinson*, 64 Calif. 373, 1 Pac. 156; Deering's Calif. Civil Code, Sec. 320a; Del. Rev. Code 1935, Sec. 2061; *Morrill* v. *Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547; New Jersey Rev. Stat. 1937, Secs. 14: 10-5, 14: 10-6; New York-McKinneys Consolidated Laws, Stock Corporation Law, Sec. 47; North Carolina Gen. Stat. 1943, Sec. 55-107.

[30] 5 Fletcher, *Cyclopedia of Corporations* (perm. ed.), Secs. 2017, 2044, pp. 83, 155; *In re Chenango County Mutual Ins. Co.*, 19 Wend. (N. Y.) 635; *Rossing* v. *State Bank*, 181 Ia. 1013, 165 N. W. 254. Cf. *People* v. *Robinson*, 64 Calif. 373, 376, 1 Pac. 156.

tion agreement, the case is fully discussed with that phase of the instant case (see *infra*, pp. 58–59). It is sufficient to note here that the Circuit Court of Appeals for the Sixth Circuit there enforced an order which required the employer to bargain collectively with a union chosen in an election in which the regional director had refused to consider a post-election challenge which might have been determinative of the results of the election. The court construed the Act as vesting in the Board "broad discretion" to make rules governing the conduct of elections (140 F. 2d at 759). And it ruled that the Board had acted within its powers in holding the union there involved the designated representative of the employees without looking into the eligibility issue raised by the post-election challenge.

The reasonableness of the Board's rule barring post-election challenges to the eligibility of voters, therefore, is supported not only by the necessities of the industrial situation, but also by authorities dealing with related problems growing out of political and corporate elections, and the only decision, other than that of the court below, considering the problem under the National Labor Relations Act.

Elections must be final at some point. If the time of the commingling of the ballots cannot be said to be a proper point before which a challenge to the eligibility of a voter must be made, no subsequent point of time could be set with greater

validity. The decision below is based upon a principle which would permit the issue of eligibility to be raised at any time, even in a complaint proceeding following the election. The Board's certification of a union would thus be final as against possible challenges only if the Board had entered into the laborious task of making inquiry and findings with respect to the status of every voter. As is apparent from its description (*supra*, pp. 31–40), the Board's election machinery operates on the premise that the Board will not actually determine the eligibility of any person to vote unless some question of his eligibility is raised prior to the time his ballot is cast. Hence, most of those who vote are persons whose status either as employees or as workers within the appropriate unit has never been the subject of any finding by the Board. If, as the court below holds, such a finding is a jurisdictional prerequisite to the validity of the Board's certification of a union, and cannot be waived or rendered unnecessary by failure to raise the issue in timely fashion, the Board will be required to alter its election machinery materially.[31]

[31] The principle enunciated by the court below would require the Board to determine the membership of an employee in the appropriate unit, equally with his employee status, if a post-election challenge were made as to his eligibility on the ground that his work falls outside the unit; for Section 9 (a) of the Act renders the representatives of a majority of the "employees in a unit" the exclusive representative for bargaining purposes.

Nor could the defect be easily cured. The time and expense which would be consumed by such a change of procedure would mean an end of employee elections on the scale on which the Board has handled them in the past. To date the Board has conducted approximately 30,000 elections[32] and polled more than seven million employees.[33] On at least one occasion, the Board polled approximately one hundred thousand employees in a single election.[34] Any procedure which required that the Board actually determine the employee status of each of these voters would be unworkable and, we submit, was not intended to be required by the Act. What was intended, rather, was that the Board should design machinery to enable it expeditiously to poll large numbers of employees with appropriate safeguards to assure that no one will vote who is not eligible. The machinery above described fulfills this purpose. It has been tested in thousands of elections. The decision in the instant case by the court below is the first instance in which any fault has been found with it. Indeed, the very rarity of the instances in which any question has been raised by either an employer or a union,

[32] See the figures given in National Labor Relations Board, *Tenth Annual Report*, p. 8, plus approximately 7,000 elections held during the fiscal year 1945–1946.

[33] See figures given in National Labor Relations Board, *Tenth Annual Report*, p. 8, plus approximately a million employees polled during the fiscal year 1945–1946.

[34] National Labor Relations Board, *Seventh Annual Report*, p. 33.

and the entire satisfaction so generally voiced over the Board's election procedures, should suffice to show that the decision below was unwarranted by either law or experience.

II

THE BOARD PROPERLY HELD THAT SINCE RESPONDENT HAD SIGNED A CONSENT ELECTION AGREEMENT, IT WAS BOUND BY THE REGIONAL DIRECTOR'S RULINGS WHICH WERE NEITHER ARBITRARY NOR CAPRICIOUS

A. *Article III, Section 12, of the Board's Rules and Regulations, which provides that, in a consent election, the rulings of the regional director on the conduct of the election and the eligibility of voters shall be final, is valid as applied by the Board to mean that all rulings of the regional director on such matters are final unless arbitrary and capricious.*—Acting pursuant to Section 6 of the Act (*infra,* p. 75), which authorizes the Board to make such rules and regulations as may be necessary to carry out the provisions of the Act, the Board adopted a rule (Article III, Section 12, *infra,* pp. 81–82) providing for consent election agreements. The rule enables the parties to a representation proceeding pending before the Board to dispense with all formal proceedings by entering into an agreement as to the scope of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote. The rule

provides that a consent election under such an agreement shall be conducted under the direction and supervision of the regional director in a manner consistent with the method followed by the regional director in conducting elections directed by the Board, except that the rulings of the regional director shall be final.

The consent election has been used by the Board from the first year of its operations.[35] Its popularity has increased to such an extent that in recent years approximately half the elections conducted by the Board are consent elections.[36] The Board has conducted approximately 17,874 consent elections under this procedure, 2,951 of which have occurred in the past fiscal year.[37]

---

[35] See National Labor Relations Board, *First Annual Report*, p. 44.

[36] See National Labor Relations Board, *Ninth Annual Report*, pp. 16, 20; *Tenth Annual Report*, p. 10.

[37] The following table shows the number of consent elections conducted by the Board, together with the report of the Board in which this information is made public:

	Number of consent elections
First Annual Report, p. 44	23
Second Annual Report, p. 29	217
Third Annual Report, p. 47	812
Fourth Annual Report, p. 51	481
Fifth Annual Report, p. 18	676
Sixth Annual Report, p. 36	1,932
Seventh Annual Report, pp. 32–34	*3,050
Eighth Annual Report, p. 24	*2,755
Ninth Annual Report, p. 20	2,434
Tenth Annual Report, p. 10	2,543
Fiscal year July 1, 1945–June 30, 1946	2,951
Total consent elections	17,874

*These figures include a number of pay-roll checks and stipulated elections.

In consent election agreements, the parties agree to forego a hearing and formal Board determination of the majority issue and to accept the findings of the regional director as final and binding—much as private parties agree to abide by the decision of an arbitrator. This device works to the advantage of both the parties involved and the Board. To the parties, it affords a speedy and convenient means of resolving any question concerning representation, enabling them to embark upon the process of collective bargaining at an early stage. To the Board, it offers a means of disposing of many of the representation cases which arise before it without the necessity of lengthy and costly formal procedures; thereby also making possible prompt effectuation of the collective bargaining policies of the Act.

To facilitate the consent election procedure, the Board, out of its experience, has developed a printed form of agreement which it furnishes to the parties when they desire to enter into a consent election agreement. This form has blank spaces to be filled in as the parties agree upon the scope of the appropriate unit, time for the election, eligibility date and the like. The agreement also sets forth, with even greater specificity than the Board's Rules and Regulations, the provision that the determinations of the regional director are to be final and binding. The agreement signed by respondent in this case provided that "the determination of the Regional Director shall be final and binding upon any question, including ques-

tions as to the eligibility of voters, raised by any party hereto relating in any manner to the election" (R. 37, 104).

If the lengthier procedure is to be dispensed with and the advantages of a speedy determination are to be preserved, it is essential that the parties abide by their agreement to accept as final and binding the rulings of the regional director and to refrain from seeking a redetermination of the issues by the Board itself. Were the Board to sanction violations of the consent election agreements, not only would the value of this procedure be lost but a premium would be placed upon the parties' failure to abide by their commitments, and an atmosphere of uncertainty and suspicion, hostile to the success of future bargaining efforts between the parties, would be created. The Board has therefore consistently held, as it did in the instant case, that it "will not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11).[38] The Board has further stated that[39]

[38] For other cases in which the Board has applied this rule, see *Matter of Aetna Firebrick Co.*, 56 N. L. R. B. 849, 853–854; *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852; *Matter of O. U. Hofmann*, 55 N. L. R. B. 683, 684, enforced, 147 F. 2d 679 (C. C. A. 3); *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 159, enforced, 140 F. 2d 754, 758 (C. C. A. 6), certiorari denied, 322 U. S. 763.

[39] The *Capitol Greyhound* case, 49 N. L. R. B. at 159.

> * * * we feel ourself bound by the terms of the agreement providing for the finality and binding effect of the Regional Director's determination to the same extent as a court is bound by an agreement to abide by an arbitrator's award. To hold otherwise would permit an employer deliberately to ignore binding commitments embodied in a consent agreement; would open the door to subterfuges for hampering and delaying a final determination of a bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act.

This rationalization of the Board, as well as the practice itself, received express judicial approval in *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C. C. A. 6), certiorari denied, 322 U. S. 763. The facts in that case were identical with the facts in the instant case except that the employee Nolan, whose vote, if cast for the union, was determinative of the election in that case, had been hired for the first time subsequent to the eligibility date. The employer had apparently inadvertently supplied the regional director with the pay roll for a period subsequent to the eligibility date. The Board held that the regional director's ruling barring the employer's post-election challenge was correct and neither arbitrary nor capricious, although Nolan was in fact not eligible to vote (49 N. L. R. B. 156, 158–159). The circuit court of

appeals enforced the Board's order, quoting with approval the paragraphs of the Board's decision in which the Board explained why it regarded the regional director's ruling as neither arbitrary nor capricious (140 F. 2d at 758) and pointing out that the Board's action was entirely within the broad discretion committed to it by Congress in the matter of determining bargaining agents (140 F. 2d at 759).

The Board's consent election procedure is also fully supported by the many cases in this and other courts which hold that parties to a contract may agree in advance to submit broad categories of questions to a designated person and that his decision, once arrived at, is final and binding unless fraudulent or arbitrary and capricious.[40] In the light of these decisions, we think it plain that the Board's regulations may validly provide for

[40] *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *Plumley* v. *United States*, 226 U. S. 545; *Martinsburg & Potomac R. Co.* v. *March*, 114 U. S. 549; *Memphis Trust Co.* v. *Brown-Ketchum Iron Works*, 166 Fed. 398, 403–404 (C. C. A. 6), certiorari denied, 214 U. S. 515; *Kihlberg* v. *United States*, 97 U. S. 398, 401; *United States* v. *Gleason*, 175 U. S. 588, 602, 606–607; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 278; *Minton* v. *F. G. Smith Piano Co.*, 36 App. D. C. 137; *United States* v. *Cooke*, 207 Fed. 682, 685 (E. D. Wash.); *The Hartbridge*, 62 F. 2d 72 (C. C. A. 2), certiorari denied, 288 U. S. 601; *Richardson & Sons* v. *Hedger Transportation Corp.*, 98 F. 2d 55, 57 (C. C. A. 2); *Wilkins* v. *Allen*, 169 N. Y. 494, 62 N. E. 575, 576–577; *Pendleton* v. *Pace*, 9 S. W. 2d 437 (Tex.).

an agreement which leaves procedural as well as fact questions relating to the election to the regional director, and that such an agreement, once made, is binding in all respects. In this case the issues raised by the employer's challenge were submitted to the regional director and determined by him. Under any view, therefore, his decision should be given effect unless arbitrary or capricious.

B. *The regional director's ruling was neither arbitrary nor capricious.*—The Board's finding that the regional director's ruling rejecting respondent's challenge to Mrs. Kane's eligibility is neither arbitrary nor capricious is sustained by all of the reasoning which supports the validity of the rule excluding post-election challenges to the eligibility of voters (see *supra*, pp. 27–54). But quite apart from the validity of this rule, the circumstances of this case, as found by the Board,[41] warrant its findings upholding the finality of the regional director's ruling.

Respondent, fully aware of the requirements for voting, placed Kane's name on the eligibility list which it submitted to the regional director on May 1, 1944 (R. 12, 19; R. 37, 103, 111).[42] This list

[41] It should be noted that all of the findings of the trial examiner, made in his intermediate report (R. 18–28), were adopted by the Board as its own findings (R. 11).

[42] In the following description of the circumstances upon which the Board relied, the references preceding the semicolon are to the Board's findings and the succeeding references are to supporting evidence.

was furnished by respondent as a complete list of its employees in the appropriate unit on its pay roll for April 21, 1944 (R. 12, 19; R. 37, 110).[43] Mrs. Kane, a stitcher whose classification falls within the appropriate unit, was marked upon the list of eligible voters submitted by respondent as "out sick" (R. 19; R. 41, 58). Mrs. Kane, who last worked at the respondent's plant on March 24, 1944, had sent her forelady a note on March 31, 1944, stating that she had not been to work the preceding week because she had been sick and asking that her pay be given to the bearer of the note (R. 20; R. 57, 65–67, 69, 113). Respondent has never set a time limit as to how long an employee may be absent from work because of illness before being separated from the pay roll (R. 25; R. 78). In some cases employees remain on the pay roll although they are away from work "a good many months" because of illness (R. 25; R. 78–79). Mrs. Kane's name was not taken off the respondent's pay roll until some time after May 8, 1944 (R. 25; R. 69–70). It was not until the early part of July, when she returned to the plant to see if there was lighter work available for her, that Mrs. Kane was first informed that her name was no longer on the pay roll (R. 25; R. 72). There

[43] The employees on the pay roll of April 21 were paid on that day for work performed from April 7 to April 14, as it is the respondent's practice to pay its employees one week after the termination of the work period for which payment is made (R. 19; R. 55).

is no evidence that Mrs. Kane has worked anywhere else since March, 1944 (R. 25; R. 74).

Mrs. Kane appeared at the polling place on May 5, 1944, and cast an unchallenged ballot (R. 20; R. 37, 110–111). At the election, the respondent was duly represented by two observers who had been informed of their rights and duties with respect to such matters as the challenging of the ballot of any person not qualified to vote (R. 20; R. 37, 110–111). One of the respondent's observers, a clerk in the factory office, regularly received records in the course of her duties by which she would have known whether any given employee, such as Mrs. Kane, had actually worked during any given week (R. 20; R. 72–73). The company observers at the polls where Mrs. Kane voted attested that the balloting was fair, that all eligible voters were given an opportunity to vote and that there were 230 valid votes (which number included Mrs. Kane's vote) (R. 20; R. 37, 106–108, 111). It was not until four days after the election that respondent raised any challenge to Mrs. Kane's participation in the election although respondent had notice of all the facts upon which its challenge was based several days before the election (R. 20; R. 37, 80, 110–111, 114–115).[*] These circum-

[*] Respondent's contention that it did not know these facts until they came to the attention of its superintendent on May 8 is based on a misapprehension as to applicable law. Since respondent is a corporation, both the regional director (R. 37, 110–111) and the Board (R. 12) properly treated the receipt by the mailing clerk of the notice from

stances, it is submitted, place respondent in default; and the regional director, as the Board found (R. 11–12), reasonably so ruled (R. 37, 111).

The facts upon which the Board relied in holding that the regional director's refusal to consider the post-election challenge was neither arbitrary nor capricious, are very similar to those set forth in the portions of the Board's decision in the *Capitol Greyhound* case, which the Circuit Court of Appeals for the Sixth Circuit quoted with approval (140 F. 2d at 758):

---

the Massachusetts Division of Employment Security as notice to respondent. This notice was postmarked May 1, 1944 (R. 27; R. 60). In the normal course of business, it would have been received on May 2, 1944 (R. 27; R. 68). It was the duty of the mail clerk to place this notice on the superintendent's desk as soon as she opened the letter (R. 27; R. 68–69). While the superintendent testified that he did not see it until Monday, May 8, 1944 (R. 27; R. 59–60, 68), he admits that he found it in the proper file as soon as he looked for it (R. 27; R. 59–60). Nor does respondent deny that the notice must have been received prior to the election which was held at the close of work on Friday, May 5, 1944, the last work day preceding Monday, May 8, 1944 (R. 23, 27; R. 41, 59, 68). The law is well settled that a notice mailed to a corporation but opened by a mail clerk is notice to the corporation even though it is improperly filed and never comes to the attention of the appropriate officers. *Hand & Johnson Tug Line* v. *Capada S. S. Lines, Ltd.*, 281 Fed. 779 (C. C. A. 6); *Pellon* v. *Conn. Gen. Life Ins. Co.*, 105 Vt. 508, 168 Atl. 701; *Palmer* v. *New York Herald Co.*, 228 App. Div. 176, 239 N. Y. S. 619; *Twombley* v. *Framingham Gas, Fuel & Power Co.*, 248 Mass. 53, 142 N. E. 828.

In overruling the respondents' objection, the Regional Director had before him and considered the following facts. The list of eligible voters attached to the agreement was prepared solely by the respondents, was submitted by them at the time of the execution of the agreement, and, by the terms of the agreement, was the sole and exclusive list of eligible voters. Whether or not Nolan was employed by the respondents on the agreed eligibility date of July 31, was a fact peculiarly within the respondents' knowledge. Yet, not until the respondents were informed of the outcome of the election did they raise any objection to Nolan's vote. Only 2 months after the election, Graves, the respondents' vice president and general manager, who signed the agreement to which the eligibility list containing Nolan's name was attached, was unable to state that he had no knowledge prior to the election that Nolan's name was erroneously placed on the eligibility list. The respondents offered no evidence to show that Nolan voted for the Union.

Upon these facts, we find that the Regional Director's ruling was neither arbitrary nor capricious.

The court below, in its opinion, asserts a distinction between the facts of the Capitol Greyhound case and those in this case on the ground that there the ineligible voter was an employee at the time of the election, whereas here Mrs. Kane may

not have been (R. 122). It seems clear, however, that once the eligibility rules for an election are fixed, the number of days by which the voter misses the qualifying pay-roll period and the time relation of those days to the eligibility date, are immaterial. A voter is either eligible or ineligible. Just as Nolan would have been eligible had the consent election agreement provided a later eligibility date, so would Mrs. Kane have been eligible if the consent election agreement had provided that the election be held a month earlier. No difference in legal principle can be made to turn upon such distinctions.

Respondent contends that the regional director's ruling was arbitrary "as a matter of law"[61] in that, by permitting the vote of a non-employee to determine the results of the election, it violated the terms of both the Act and the consent election

[61] Respondent's contention, made in its brief before the Board, that "no matter how painstaking a tribunal may be, its decision is as a matter of law arbitrary and capricious if it disregards or violates clear principles of law" is clearly without merit. As has been held in numerous cases involving agreements to arbitrate similar to the consent election agreement in this case, where the parties have agreed beforehand to abide by a decision, it will not be overturned in the absence of fraud or bad faith, though it be based upon an erroneous construction of the law. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *United States* v. *Cooke*, 207 Fed. 682, 685 (E. D. Wash.); *Richardson & Sons* v. *Hedger Transportation Corp.*, 98 F. 2d 55, 57 (C. C. A. 2); *The Hartbridge*, 62 F. 2d 72 (C. C. A. 2), certorari denied, 288 U. S. 601; *Wilkins* v. *Allen*, 169 N. Y. 494, 62 N. E. 575, 576–577.

agreement which provide that the exclusive representative shall be chosen by a majority of the employees (R. 39–40, 45–46, 47). But the regional director made no finding as to how Mrs. Kane voted or whether or not Mrs. Kane was an employee of the respondent at the time of the election. The Report on Objections did not resolve the first point. And the Board ruled that the statement submitted by respondent to prove that Mrs. Kane voted for the Union could not be accepted as evidence (R. 12). On the second point, the Report on Objections by the regional director refers to Kane's employment status as "not quite clear" (R. 37, 111). Indeed, the trial examiner's finding on this point, which was adopted by the Board, is as follows (R. 25):[62]

> * * * while the evidence appears to afford ample basis for a finding that, at the time she voted, Kane was an employee who was not working because she was ill; it is equally apparent, on the one hand, that the Regional Director's less positive finding, as to Kane's status was neither arbitrary nor capricious and, on the other hand, that the evidence does not warrant a finding in line with respondent's contention that Kane was no longer its employee when she voted on May 5, 1944.

---

[62] One member of the Board, concurring in the result reached by the majority, found from the evidence that Mrs. Kane was in fact an employee at the time she cast her ballot (R. 15).

The Board itself dealt with the issue of whether its action amounted to a ruling that elections could be decided on the ballot of a non-employee by stating (R. 11–12):

> 3. The respondent further contends that the right to challenge a voter on the ground that he is a non-employee cannot be waived as a matter of law. The Respondent reasons that since it would not be valid for the respondent in advance to agree with the Regional Director to permit non-employees to vote, the respondent cannot do so by waiver. Here again we believe that the respondent has misconceived the issue. Were the Regional Director knowingly to agree in advance to permit non-employees to vote, we might well hold his action to be arbitrary and capricious, but that is not the issue in this case. Here we are confronted solely with the question of whether the respondent, after certifying Kane as an eligible employee voter and permitting her to vote without challenge although facts which it now asserts rendered her ineligible were then in its possession should be permitted to attack her status as a voter after the results of the election have been announced. The Regional Director's ruling that under the circumstances the respondent's claim could not be considered at that stage, is not arbitrary or capricious as a matter of law, but, as stated in the Inter-

mediate Report, is in complete accord with the established principles and policy of the Board.

Respondent further contends (Br. in Opp., pp. 3–4) that its challenge of Kane's vote four days after the election was timely because the consent election agreement provided that "objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots" (R. 37, 105). In so contending, respondent overlooks the distinction between "challenges" and "objections" which is clearly made not only in the consent election agreement itself but also by the Board's Rules and Regulations and the customary procedures and practices of the Board, which the consent election agreement provides shall govern the manner of holding the election (R. 37, 104). The consent election agreement indicates that challenges to the eligibility of voters are to be made at the polls, for it expressly provides that "each party will be allowed to station an equal number of authorized observers, * * * at the polling places during the elections * * * to challenge the eligibility of voters" (R. 37, 105). The heading of the paragraph dealing with reports on objections and challenges by its wording "Objections, Challenges, Reports Thereon" shows that objections and

challenges are regarded as distinct. This paragraph likewise makes provision for one report on objections and another, separate, report on challenges. Moreover, the consent election agreement does not provide that any party has five days after the tally for filing objections pertaining to any matter involved in the holding of the election. The language is much narrower. It speaks of "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof."

The Board's Rules and Regulations also speak of "challenges" and "Objections" as separate and distinct categories (Article III, Section 10, *infra*, pp. 79–81). They give the parties five days within which to file "Objections to the conduct of the election or conduct affecting the results of the election". They transfer the case to the Board "if no such Objections are filed within five days" and "if the challenged ballots are insufficient in number to affect the result of the election". If such objections are filed, the Regional Director is required to prepare a "Report on Objections". If there are such challenged ballots, he is required to prepare a "Report on Challenged Ballots".

The Board, in rejecting respondent's contention that the provisions of the consent agreement en-

titled it to question Mrs. Kane's status by an objection filed within five days, stated (R. 11):

> The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's Rules and Regulations. The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot.

The Board has uniformly followed the "policy of differentiating between objections to the conduct of an election and challenges to the eligibility of voters and it does not ordinarily permit challenges under the guise of objections after the election".[63] The term "challenge" is a word of art in the field of elections. It usually connotes a confrontation of the prospective voter at the time he applies for a ballot.[64] In most states, provi-

[63] *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. See also *Matter of Owens-Corning Fiberglas Corp.*, 61 N. L. R. B. 546, 551–552; *Matter of Kellogg Switchboard and Supply Co.*, 28 N. L. R. B. 847, 852; *Matter of Capitol Greyhound Lines*, 49 N. L. R. B. 156, 158–159; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739–740.

[64] See the description of the manner in which a challenge is to be made in the following statutes: Alabama Code 1940, Title 17, Secs. 187–190; California, Deering's Elections Code, Secs. 5620–5631; Colorado Stat. Ann. 1935, c. 59, Sec. 228; Connecticut Rev. Stat. 1930, Sec. 602; Florida Stat. Ann., Sec. 102.42; Ga. Code Ann., Sec. 34–805; Idaho Code Ann.

sion is made to have someone present at the election who rules on the challenge then and there, and the voter is turned away or permitted to cast his ballot according to the decision made. In a few states, provision is made for the segregating or marking of the identity of the ballot.[65] But in all, a challenge is something quite different from an objection to the election.

Moreover, the regional director ruled that even if respondent's challenge to Mrs. Kane's eligibil-

---

1932, Secs. 33–916, 33–924; Kentucky Rev. Stat. 1944, Secs. 118.240–118.260; Louisiana, Dart's Gen. Stat., 1939 Ann., Sec. 2741; Maine Rev. Stat. 1944, c. 5, Sec. 38; Maryland Ann. Code 1939, Article 33, Secs. 57, 106; Michigan Comp. Laws 1929, Sec. 3122; Masons Minn. Stat. 1927, Sec. 425; Mississippi Code Ann. 1942, Sec. 3129; Montana Rev. Code 1935 Ann., Sec. 573; Nevada Comp. Laws 1929, Sec. 2449; New Hampshire Rev. Laws 1942, c. 41, Sec. 16; New Jersey Rev. Stat, 1937, Secs. 19:15–18, 19:15–34; New Mexico Stat. 1941 Ann., Sec. 56–314; New York-McKinney's Consol. Laws Ann., Elections, Secs. 361–364; North Dakota Rev. Code 1943, Sec. 16–1214; Throckmorton's Ohio Code Ann. 1940, Secs. 4785–82, 4785–129; Oklahoma Stat. 1941, Title 26, Secs. 63, 256; Oregon Comp. Laws Ann., Secs. 81–111, 81–1605; Purdon's Pa. Stat. Ann., Title 25, Sec. 3050; South Dakota Code 1939, Secs. 16.0225, 16.1207; Williams Tenn. Code Ann. 1934, Sec. 2078; Vernon's Civil Statutes of Texas, Ann., Art. 3006; Utah Code Ann. 1943, Secs. 25–3–35, 25–6–18; Remington's Revised Washington Stat. Ann., Sec. 5325; West Virginia Code 1943, c. 3, Art. 4, Sec. 80 (1); Wisconsin Stat. 1945, Sec. 6.50.

[65] See the following statutes which provide that, upon the challenge of a voter, his ballot is to be marked so it can later be identified should the voter be ruled unqualified: Michigan Comp. Laws 1929, Sec. 3122; West Virginia Code 1943, c. 3, Art. 4, Sec. 80 (2); Wisconsin Statutes 1945, Sec. 6.52.

ity were considered as an objection, respondent had nevertheless waived it (R. 37, 111). The Board ruled that, treating the challenge as an objection, his rejection thereof was neither arbitrary nor capricious (R. 11). There are many situations in which objections to elections may be waived by the failure to raise them promptly. The provision for five days is intended to foreclose any objections however serious which may come to light beyond that time; it does not purport to establish a rule which would safeguard a party who, discovering objections before an election has been held, hides the facts in the hope that if the election turns out badly, he could use the objection as an "ace in the hole." Nor does it protect him in carelessness about discovering facts he should reasonably have determined before the election. Such conduct in this field of the law as in others necessarily creates an estoppel. The Board has repeatedly urged all parties to be vigilant in bringing forward any matters which might prevent a fair election instead of taking their chances on the result of the election and upon losing, seeking to set aside the election.[66] Of course, if the facts, though brought to the

[66] See, for example, *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of Solvay Process Co.*, 37 N. L. R. B. 983, 984; *Matter of Moulton Ladder Mfg. Co.*, 27 N. L. R. B. 40, 46; *Matter of Kilburn Mills*, 48 N. L. R. B. 1252; *Matter of Patent Button Co.*, 65 N. L. R. B. No. 51; *Matter of Lamar Cotton Oil Co.*, 67 N. L. R. B. No. 188.

Board's attention for the first time after the election, show that the employees were under the influence of the employer's unfair labor practices when they voted or were not all advised that the election was to take place, the Board usually sets aside the election irrespective of any estoppel principles. But here there was no such situation presented. The issue relates solely to the vote of one employee. In the instant case the respondent was, to say the least, careless about Kane's status as an employee. The Board pointed out that (R. 11):

> Insofar as the respondents' objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon.

CONCLUSION

Respondent conceededly refused to bargain collectively with the Union. Its only defense was based upon the fact that the regional director's determination of majority was based on an election in which Mrs. Kane voted. His determination was in accord with Board policy, which, we submit, was valid. And irrespective of Board policy, his determination was binding on respondent under the terms of the consent election agreement. For these reasons, we respectfully submit that the respondent committed an unfair labor

practice by its refusal to bargain, and that the decree below should be reversed with directions to enforce the Board's order in full.

J. HOWARD MCGRATH,
Solicitor General.

GERHARD P. VAN ARKEL,
General Counsel,
MORRIS P. GLUSHIEN,
Associate General Counsel,
RUTH WEYAND,
EMILY CRONHEIM,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1946.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 6. The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect

to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleading, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943) are as follows:

ARTICLE III

PROCEDURE UNDER SECTION 9 (C) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

SEC. 1. *Who may file; where to file; withdrawal of petition; form; jurat.*—A petition to investigate and certify under Section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. * * *

SEC. 3. *Same; investigation by Regional Director; definition of parties; Notice of Hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a Notice of Hearing, * * *

SEC. 6. *Conduct of hearing.*—The hearing upon the question of representation shall be conducted by a Trial Examiner designated by the Board or the Chief Trial Examiner, and shall be open to the public unless otherwise ordered by the Trial Examiner. * * *

SEC. 8. *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, Notice of Hearing, motions,

rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. *Proceeding before Board; briefs; further hearing; Direction of Election; Certification of Representatives.*—The Board shall thereupon proceed, either forthwith upon the record; or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. * * *

SEC. 10. *Election procedure; Tally of the Ballots; Objections; Report on Challenged Ballots; Report on Objections; Exceptions; action of Board; hearing; contents of record.*—Where the Board determines that a secret ballot should be taken, it shall direct an election to be conducted under the supervision of a designated agent upon such terms as it may specify. Upon the conclusion of such election, the designated agent shall cause to be furnished to the parties a Tally of the Ballots. Within five (5) days thereafter, the parties may file with the designated agent an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election. Copies thereof shall be served upon each of the other parties by the party filing such Objections.

If no such Objections are filed within five (5) days after the conclusions of the election, and if the challenged ballots are insufficient in number to affect the result of the election, the designated agent shall

forthwith forward to the Board in Washington, D. C., the Tally of the Ballots which, together with the record previously made, shall constitute the record in the case, and the Board may thereupon decide the matter forthwith upon the record, or may make other disposition of the case.

If Objections are filed to the conduct of the election or conduct affecting the results of the election or if the challenged ballots are sufficient in number to affect the result, the designated agent shall investigate the issues raised by such Objections, challenges, or both, and shall prepare and serve upon the parties a Report on the Challenged Ballots, Objections, or both, including his recommendations, which report, together with the Tally of the Ballots, he shall forward to the Board in Washington, D. C. Within five (5) days from the date of the Report on Challenged Ballots, Objections, or both, the parties may file with the Board in Washington, D. C., an original and three copies of Exceptions to such report. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the designated agent. If no Exceptions are filed to such report the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record, or may make other disposition of the case.

The Report on Challenged Ballots shall consolidated with the Report on Objections in appropriate cases.

If Exceptions are duly filed, either to the Report on Challenged Ballots, Objections, or both if it be a consolidated report, or to

conduct affecting the results of the election and it appears to the Board that such Exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such Exceptions raise substantial and material issues, the Board may direct the designated agent or other agent of the Board to issue, and cause to be served upon the parties, a Notice of Hearing on said Exceptions before a Trial Examiner, designated by the Board or the Chief Trial Examiner. The hearing shall be conducted in accordance with the provisions of Sections 5, 6, and 7 of this Article, insofar as applicable. Upon the close of the hearing, the agent conducting the hearing shall forward to the Board in Washington, D. C., the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, Exceptions, documentary evidence, all of which, together with the Objections to the conduct of the election or conduct affecting the results of the election, the Report on such Objections, the Report on Challenged Ballots, and Exceptions to the Report on Objections or to the Report on Challenged Ballots, and the record previously made, shall constitute the record in the case. The Board shall thereupon proceed pursuant to Section 9 of this Article.

SEC. 12. *Hearing waived by stipulation; consent election agreements; consent cross-check agreements.* * * *

After a petition has been filed and it appears to the Regional Director that an investigation should be instituted, the part-

ties and any known individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into a consent election agreement or consent cross-check agreement leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check but not resulting in a certification by the Board under Section 9 (c) of the Act. Such agreement shall include a determination of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote or to be counted. Such consent election or consent cross check shall be conducted under the direction and supervision of the Regional Director.

The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections directed by the Board, pursuant to Section 9, Article III, of these Rules and Regulations, except that the rulings of the Regional Director shall be final, and the statement by the Regional Director of the results thereof shall be final. The method of conducting such consent cross check shall be set forth in the consent cross-check agreement. The rulings of the Regional Director on all matters shall be final, and the statement by the Regional Director of the results thereof shall be final.

U. S. GOVERNMENT PRINTING OFFICE: 1940